THE BEVERIDGE CHILD LABOR BILL AND THE UNITED STATES AS PARENS PATRIÆ

ALTHOUGH strenuous opposition has been encountered in the courts[1] whenever an attempt has been made by the legislatures to interfere with the contractual freedom of adults in matters pertaining to the contract of employment, the right of interference in the case of children has been always conceded.[2] From an early time minors have been placed under contractual disability by the law and have been looked upon as wards of the State. Having denied to them a full measure of contractual freedom, the State can hardly deny an equivalent protection; in fact the rule of contractual disability is in a large measure the result of the actual disability of the minor and his unquestioned need of protection. But not merely do these considerations apply—considerations of fair play and of an equality before the law—but the broader principles that the child of today is the citizen of tomorrow; that the whole is no greater than the sum of its parts, and that it is therefore a matter of supreme concern to the State that its wards shall be protected in the days of their helplessness and be properly trained for the duties which are to be theirs. It has been universally conceded, therefore, that the legislatures of the States may not merely confer privileges which are reciprocal and which may be justified under the theory that others have been taken away or denied, or on the broader ground that wherever there is any real contractual inequality protection may be given, but that the States may safeguard the interests of the child for considerations of their own. The right is conceded then not only to protect the child as a person against unwise contracts and an extravagant use of money, but to protect the State itself against unwise and injurious conduct on his part which may detract from his capacity and value as a citizen.[3] The State may insist that its wards shall grow up possessed of bodily, spiritual and mental strength and power, and this in spite of even so-called parental rights. The old Common Law of England indeed, which seemed to give to the father, except where the question of inheritance and marriage were concerned, almost unlimited rights over his minor

[1] Low *v.* Rees Printing Co., 41 Neb. 127; Ritchie *v.* People, 155 Ill. 98; Frorer *v.* People, 141 Ill. 171; Godcharles *v.* Wigeman, 113 Pa. St. 431.

[2] "We do not wish to be understood by anything herein said," said the Supreme Court of Illinois in declaring invalid the Illinois eight hour labor law, "that § 3 would be invalid if it was limited in its terms to females who are minors." Ritchie *v.* People, 155 Ill. 98.

[3] People *v.* Ewer, 19 N. Y. Sup. 933; S. C. 141 N. Y. 129; Matter of Stevens, 54 N. Y. St. Rep. 559; People ex Rel. Sanders, 54 N. Y. St. Rep. 349.

children, seems in America to be now generally disregarded. Here the parent is prima facie entitled to the care and custody and services of his minor children, yet if he be an unfit person therefor, or if it be for the welfare of the children that their nurture be entrusted to another, that custody may be taken from him. It is in the welfare of the child, after all, as an individual and as a future citizen, and not in the desires or rights of the parents that the law evinces the most concern.[4] No one today questions the validity of compulsory educational laws which are in any way reasonable. Nor is there any court to be found which denies to the State the right to protect the child from injurious employments and from excessive hours of labor. So far indeed, has one court[5] gone in this particular that it has been willing to sustain a statute which prohibited the exhibition of female children in public dances or theatrical exhibitions even in a case where it was shown that the exhibition was not in any sense immoral. "To society, organized as a State," the opinion says:[6] "It is a matter of paramount interest that the child shall be cared for and that the duties of support and education be performed by the parent or guardian in order that the child shall become a healthful and useful member of society. It is well remarked that the better organized and trained the race, the better it is prepared for holding its own, hence it is that laws are enacted looking to the compulsory education by parents of their children and to their punishment for cruel treatment and which limit and regulate the employment in the factory and the workshop to prevent injury from excessive labor. This legislation * * * interferes to prevent the public exhibition of children under a certain age in spectacles or performances which by reason of the place and the hour, and of the nature of the acts demanded of the child performing and the surroundings and circumstances of the exhibition, are deemed by the legislature prejudicial to the physical, mental and moral welfare of the child and hence to the interests of the State itself. The scanty dress of the ballet dancer, the pirouetting and the various other described movements with the limbs and the vocal effort cannot be said to be without possible prejudice to the physical condition of the child, while in the glare of the footlights, the tinsel surroundings and the incense of popular applause, it is not impossible that the immature mind should contract such unreal views of existence as to unfit it for the stern realities and exactions of later life. * * * The inalienable right of the child or adult to pursue a trade is indisputable, but it must be

[4] Whalen *v.* Olmstead (Conn.), 15 L. R. A. 593.
[5] People *v.* Ewer, 19 N. Y. 933.
[6] See opinion in above case.

not only one that is lawful, but which for a child of immature years the State or sovereign as parens patriæ recognizes as proper and safe. It is not the strict moralist's view but the view from the standpoint of a member of the body politic."

The question then being settled as to the right of the State to regulate the employments of children and the foundation for such right being found to lie in the conception of the child as a future citizen in whose welfare the State is concerned, the question now remains as to how far the Federal Government may itself assume the position of parens patriæ and itself take measures for the protection of the children of the Nation. There can be no question that the Supreme Court of the United States would sanction legislation on the part of a State which should be directed towards the suppression of child labor. There is no question that it concurs thoroughly in the proposition that the child is a future citizen and that the welfare of the individual citizen is a fit subject for State governmental solicitude.[7] But can Congress act in the matter? Can Congress itself directly aid in the movement?

This was the real question raised by the so-called Beveridge Bill which was urged upon the last session of Congress and which sought to forbid the transportation of the products of child-labor over interstate lines.[8] The bill, however looked upon, raises a serious question of National duty and of National power. It can be justified in its legal aspect on only two theories, both of which are novel and startling in their significance. One is that the power of Congress over interstate commerce is unlimited and unrestricted and that Congress can use that power at its will to interfere with the domestic policies of the several States and to force its conception of public policy upon them. The other theory is that the United States itself is parens patriæ and that from the very fact of nationality there arises the power to protect and watch over the individual citizen wherever he may be found.

Prior to the adoption of the Fourteenth Amendment the Federal Government had practically no control over the domestic affairs of the several States save that which might possibly have been implied

[7] In an opinion sustaining a statute of Utah which limited the hours of labor in underground mines, the Supreme Court of the United States said: "The fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The State still retains an interest in his welfare, however reckless he may be. The whole is not greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed the State must suffer." Holden *v.* Hardy, 169 U. S. 366.

[8] See Congressional Record, Vol. 41, No. 43, page 2129.

from the grant to it of the power to regulate interstate commerce, or which arose from the very fact of nationality itself. It certainly had no power in the matter expressly granted to it, nor was there any grant of power which expressly authorized any effort to protect or aid any individual citizen. Even the Fourteenth Amendment, which gave to the Federal Courts the power to nullify State statutes which interfered with liberty and property without due process of law, and which made it unlawful for any State to abridge the privileges or immunities of citizens of the United States, gave to Congress no power of legislation. It gave to the Federal Courts a broader jurisdiction but did not add, in any measure, to the jurisdiction of Congress.[9] And although the amendment emphasized the fact that there was such a thing as a citizenship of the United States as distinguished from a citizenship of a particular State,[10] no direct grant of power was made to the national government by which Congress could legislate to protect or to further the interests of such citizens. Prior to the adoption of the amendment, indeed, there was no specific recognition of a citizenship of the United States as distinct from a citizenship in one of the constituent States; in fact, there was nothing in the Constitution on the subject of citizenship at all save the provision which gave to Congress the power to establish a uniform rule of naturalization and the assumption of citizenship contained in the words "we, the People of the United States." Senator Beveridge, however, although he did not suggest the point directly,[11] pushed into the foreground the question of United States citizenship and the power of the Federal Government in relation thereto. The question hardly suggested but really involved in the argument in Congress, is whether our conception of American nationality is so strong that the national government by virtue of the very fact that it is a national government, and without any express grant of power, has the right to supervise the training and to watch over the lives of its own citizens, or whether these matters belong to the State and to the State alone. In short, the question involved in the Beveridge Bill is whether the child is a ward of the United States as well as of the State in which he resides. There is no grant of power which gives to the Federal

[9] Civil Rights Cases, 109 U. S. 13.

[10] See Slaughter House Cases, 16 Wall. 73. Wise on Citizenship, page 20.

[11] He merely in a well intentioned desire to crush out an undoubted evil, acts upon the theory that the end justifies the means and without any regard to the legal consequences of the precedent calls upon Congress to use the interstate commerce club. Although Senator Spooner raised the question in the congressional debate and sought to push it home, Senator Beveridge evaded and refused to discuss it. See Congressional Record, Vol. 41, page 2153.

Government the right to protect its citizens while abroad. The power is implied from the very fact of nationality. Does this fact of nationality give the implied power to protect the minor while at home?

This is the real question involved in the Beveridge bill. It is not the question, however, which was presented directly by Senator Beveridge in his argument before the Senate. The position taken by him was that the power of Congress over interstate commerce was supreme; that the power to regulate involved the power to destroy; that it extended to the levying of embargoes on domestic as well as on foreign voyages; that Congress could exclude from interstate commerce anything it chose, and that so unlimited was its power that no court could call it to account. He did not raise the question of American citizenship and American nationality, although it was necessarily involved. Instead of relying upon it he suggested in its place a round about means of accomplishing his purpose by a usurpation of power, or if he would have us say so, a new exercise of power on the part of Congress, the exercise of which could only be constitutionally justified by the acceptance of the national theory which we have suggested.

The case which bears most directly upon the subjects suggested by Senator Beveridge, and the one most relied upon by him for the support of his bill, is the so-called *Lotteries Case*,[12] a case in which an Act of Congress was sustained by the Supreme Court of the United States which prohibited the carriage of lottery tickets upon interstate lines. The underlying and controlling theory of this case, however, appears to be not so much that lottery tickets are the subjects of interstate traffic and that Congress has the power to destroy as well as to regulate commerce (for this is not held at all), as that they are common nuisances in which there are no property rights, and that being nuisances and not property, the owners of them have no rights which Congress is bound to respect. "If," the Court says, "the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries carried on through such commerce is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both National and State legislation in the

[12] Champion *v.* Ames, 188 U. S. 321.

early history of the country, has grown into disrepute and has become offensive to the *entire* people of the Nation." The opinion, in short, takes the position that the lottery ticket is a nuisance; that it is condemned by the people of *all* of the States, and that Congress as a residuary trustee of the *welfare of all* and as the only agency which has direct supervision over interstate lines of communication, has the power, if not the duty, to supplement the police activities of the several States and to prohibit the transportation of such articles. The case comes far, however, from holding that Congress may deny the use of the interstate lines of communication to goods or articles which are not, as are lottery tickets, useless, or intrinsically harmful, and whose sale is not forbidden by the laws of *all* of the States. There is, in short, no authority, which, on the theory of the right to regulate commerce alone, would induce us to believe that Congress may forbid the carriage of the products of child-labor out of a State where the employment of children is not forbidden and into States where it is also not forbidden. Nor is there any support even in the *Lotteries Case* for the proposition that by means of the Commerce Clause of the Constitution, Congress may superimpose its conception of public policy upon the public policy of the several States. We must remember that the lottery ticket is useless and a nuisance and that the coat, the ax handle or the other manufactured product is a legitimate article of commerce, that it is useful, and that it is its method of manufacture alone which is reprehensible; that in the majority of the States where it is manufactured, even its method of manufacture is not condemned by the law.[13] The difficulty in the way of the residuary police power theory suggested in the *Lotteries Case* when applied to the Beveridge Bill lies in the fact that few of the States have adequately legislated against the evils of child labor,[14] and that the primary purpose of the Beveridge Bill and of calling upon the Federal Government for the aid suggested is to crush out the evil of child labor in those States whose legislatures have refused to act in the matter. The question presented for determination is a question which might well have been presented prior to the Civil War. In those days it would have been this: Conceded that Congress may not directly legislate against the system of slavery existing in the Southern States, may it accomplish the same result by absolutely shutting out from the avenues of interstate and

[13] At least not to the extent required by the Beveridge Bill. There would of course be some support for a bill which should seek to supplement the police activities of the several States by refusing interstate transportation to goods manufactured in violation of the laws of the State in which they are made. For a summary of the State laws see Congressional Record, Vol. 41, page 2152.

[14] See note 13 ante.

foreign commerce all products of slave labor, especially cotton? Or, if we apply the question generally to our own time, and use the argument of Senator Beveridge and push it to its logical conclusion: Can a Northern majority of wool producers and wool manufacturers shut out from commerce competing cotton goods? Can a majority of butter producers shut out from commerce oleomargarine no matter how scientifically prepared? and may the manufacturers of carriages shut out from commerce automobiles?

It is true that in support of his contention that the power of Congress is unlimited in so far as interstate commerce is concerned, Senator Beveridge was able, in his argument before the Senate, to call to his support numerous dicta of the courts. But they were dicta merely. They were made in cases where the total destruction by Congress of interstate commerce in any article or thing or the impairment of its freedom was not sought to be justified, but in which the imposition of restrictions by the States was sought to be prevented. In the case of *Stockton* v. *Baltimore R. R. Co.*,[15] for instance, from which the Senator quoted the following language: "We think the power of Congress is supreme over the whole subject (of interstate commerce) uninterrupted and unembarrassed by State lines or State laws; that in this matter the country is one and the work to be accomplished is national, and that State interests, State jealousies and State prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no States," the question before the Court was not the power of Congress to prohibit or to destroy commerce, but it was its right and power to extend it. It was whether Congress had the power to authorize two railroad companies to construct a bridge across Staten Island Sound and to establish the same as a post road. In other words, whether Congress could legally provide for commercial intercourse between two States by land as well as by water, by rail as well as by steamboat. So, too, in the case of *Brown* v. *Houston*,[16] from which the Senator quoted, the dicta that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations," the language was used merely in connection with a discussion concerning the power of a State to levy a tax on interstate commerce and not in connection with a consideration of the power of Congress to destroy it. While in the case of *Crutcher* v. *Kentucky*,[17] on which perhaps more stress is laid than on any other case, unless it be the

[15] 32 Fed. Rep. 9.
[16] 114 U. S. 622.
[17] 141 U. S. 47.

Lotteries Case to which we have before referred, the language quoted[18] was used in connection with a discussion of the right of a State to require foreign express companies to pay local license fees and to make a deposit with the State officers. The weakness of a position, indeed, can often be best ascertained by an examination of the arguments which are produced in its support. Senator Beveridge does not attempt to bring to the defense of his bill any historical analogy, principle of contemporaneous construction or adjudicated cases which pass directly upon the question involved. He supports his position merely by a portrayal of the evils of child labor,[19] of the inadequacy and lack of uniformity of the State laws adopted for its suppression, by the dicta to which we have before referred, and by an eloquent peroration with the spirit of which we all concur but which suggests a conception of national citizenship and of national duty rather than an unlimited commercial power.[20]

Nor must we be misled by the cases which have held it lawful to exclude lottery tickets and similar articles from the mails and to issue so-called fraud orders.[21] They were cases in which the things excluded were in themselves harmful. They, too, were decided entirely upon the theory that the power vested in Congress to *establish* postoffices and post roads embraced the regulation of the entire postal system of the country; that Congress might designate what might be carried in the mails and what excluded; that Congress under this constitutional provision was given the power to create a postal system which it should itself operate, and could therefore

[18] "It has frequently been laid down by this Court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would anyone pretend that a State legislature could prohibit a foreign corporation—an English or a French transportation company for example—from coming into its borders and landing goods and passengers at its wharves and soliciting goods and passengers for a return voyage without first obtaining a license from some State officer and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of State legislation but within that of national legislation. The prerogative, the responsibility, and the duty of providing for the security of the citizens and of the people of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States and not to the government of the several States; and confidence in that regard may be imposed in the national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the State legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two."

[19] These evils the writer does not dispute. Nor does he deny the urgent necessity for action in the matter. It is the means and the theory suggested by Senator Beveridge with which alone he takes issue.

[20] See Congressional Record, Vol. 41, pages 2129 to 2185.

[21] See In the Matter of Orlando Jackson, 96 U. S. 727; In re Rapier and Dupree, 143 U. S. 110; Horner *v.* U. S., 143 U. S. 207; 147 U. S. 449.

impose what conditions it chose upon the use of the instruments it created. In the case of interstate commerce, however, Congress has created and was given the power to create nothing. It was given the power merely to regulate that which was before in existence, and that which it itself did not own or operate. The leading case on the subject, indeed, expressly repudiates the idea that the same power of exclusion can be exercised in interstate commerce generally that can be exercised in the case of the postal system. "We do not think," the Court says, "that Congress possesses the power to prevent the transportation in other ways as merchandise of matter which it excludes from the mails. To give efficiency to its regulations and to prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes of articles which legitimately constitute mail matter in the sense in which those terms were used when the Constitution was adopted—consisting of letters and newspapers and pamphlets when not sent as merchandise—but further than this, its power of prohibition cannot extend."[22] But this case Senator Beveridge absolutely ignores.

There would seem to be but little doubt that the theory of the Constitution was that of a complete commercial freedom between the several States, and even a practically complete freedom of exportation to foreign countries.[23] It is true that the right to enforce an embargo as a sort of war measure was from an early time conceded to the national government, and was no doubt contemplated by the framers of the Constitution. But an embargo is at the most a suspension of commerce rather than a destruction of it,[24] a suspension imposed as a war, a retaliatory measure, not that commerce may be

[22] In the Matter of Orlando Jackson, 96 U. S. 727.

[23] A large portion of Senator Beveridge's argument before the Senate was an attempt to prove that the power of Congress over interstate commerce is as extensive and comprehensive as over commerce with foreign nations. On this point he cited The Lotteries among other cases. The proof even of this proposition would not, as we have attempted to show in this article, necessarily prove the validity of his bill. And on this point the remarks of Senator Knox are quite significant. The Senator said: "I had something to do with the Lottery case. The final argument was made when I was Attorney General and I had something to do with the preparation of the case; and the reason why I say I would be under a personal obligation for a direct decision upon the proposition that the control over interstate commerce is just the same as it is over foreign commerce, is because we used every one of those cases which the Senator has cited and we worked every one of those statements for all they were worth in order to get the Court to base the decision in the Lottery case upon that ground, which would have been conclusive ground, and would not have necessitated the Court going elsewhere. But if the Senator will examine that decision he will see that they put it on other grounds." Congressional Record, Vol. 41, page 2180.

[24] The Standard Dictionary defines the word "Embargo" as "A prohibition by the sovereign power of a nation temporarily restraining vessels from leaving its ports; authorative stoppage of foreign commerce or of any special trade."

destroyed but that it may ultimately be the freer. The primary idea, indeed, was, that the power over commerce was to be used by the Federal Government to promote and not to destroy; that it was to be used for commercial purposes and not to dictate local policies. When in the contemporaneous literature, in the Federalist and elsewhere, the right to restrict commerce was spoken of or conceded, it was treated in the form of a protective tariff or of an embargo, which was to be imposed by the central government for commercial purposes merely and as a weapon of defense in the commercial warfare with the foreign nations. It was a weapon to be used to prevent hostile legislation or action by foreign powers and to prevent the crushing out of our industries. It was to be used as a temporary restriction in order that greater freedom might be the result.[25] It is by no means an unimportant fact that the Fifth Amendment which forbade the deprivation of life, liberty or property without due process of law, was adopted after the grant to Congress of the power to regulate commerce. It must therefore be deemed a limitation on that power. Due process of law certainly means an equality before the law. The right to liberty and property would certainly include the continuance of the right of interstate traffic in goods which were in themselves harmless and innocent. We cannot believe that the power to regulate was considered to include the unlimited power to destroy.[26]

There is another theory, however, as we have before intimated, on which Congress perhaps may act in the matter, and that is the theory that the citizen of a State is also a citizen of the United States; that the United States has the right to protect its own citizens; that it, as well as the State, is parens patriæ.

This is no doubt a new govenmental theory in the United States, or at any rate a theory which has not been judicially promulgated. Since the Civil War, however, and the adoption of the Fourteenth Amendment it has had much in its support. Every person born or naturalized within the United States and subject to the jurisdiction thereof is a citizen of the United States as well as of the State in which he resides. The whole is no greater than the sum of its parts, and the strength of a nation certainly depends upon the strength and intelligence and morality of its individual citizens.[27] Unless we adopt the theory that the United States is a confederation and a confederation alone (and the Fourteenth Amendment by defining United States citizenship seems to negative

[25] See Federalist, No. 11.

[26] See opinion in In re Orlando Jackson, 96 U. S. 727.

[27] See opinion in Holden *v.* Hardy, 169 U. S. 366.

this idea, even if the arbitrament of arms did not), the interest of the nation in the welfare of its individual citizens and its duty to furnish them when necessary with at least that measure of protection which shall make it possible for them to grow up in strength and virility and to become effective soldiers and citizens is undeniable. De Tocqueville, in the middle of the last century,[28] asserted that there was practically no national power in America and that an attempt to enforce a compulsory conscription would result in a dissolution of the Union. The Civil War, however, and the almost uniform acquiescence in the practice of drafting soldiers therein pursued, have totally disproved the assertion. The struggle also taught, as no other lesson could have taught, the absolute dependence of the nation upon the virility and morality of its citizenship. No one during that struggle would have doubted the power of Congress to punish those who should cut off their fingers or in other ways render themselves unfit for military service and thus seek to escape the drafts. After the reports of the parliamentary commissions in England which were appointed to examine into the causes of the physical degeneracy of the British people, which, with a population of forty million people, made it almost impossible "to raise 320,000 able bodied British soldiers to meet twenty-eight thousand Boer farmers upon the field of battle," and after a perusal of the data on the condition in America furnished by Senator Beveridge, can there be any doubt that the welfare of the citizen is a fit subject for governmental concern? Can anyone deny that the employment of child labor has been a potent factor in the physical deterioration of the British people and is not only now rapidly becoming but has always been a potent factor in the deterioration of the American?[29]

Congress then, it would seem, should act in the matter directly, though perhaps punish indirectly. It should take the broad position that the protection of the health and of the lives and of the morals of its citizens is as much a matter of national concern as the protection of the currency or of the flag; that the protection of the health and lives of its citizens while at home is as much within its province as their protection while abroad. It should directly prohibit the employment of child labor and establish, as far as possible, a uniform rule in relation thereto, a rule, however, which should adapt itself to climatic and other conditions. It should punish violations of this rule in part by denying the right of interstate commerce to those

[28] De Tocqueville, Democracy in America, Vol. 1.

[29] See argument by Senator Beveridge, Congressional Record, Vol. 41, page 2129, etc. Seq.

who have violated it.[30] Whether we are so far a nation that this may be done, is for the courts to decide. The direct attack is certainly just as constitutional and defensible as the indirect. In fact the indirect method suggested by Senator Beveridge can alone be justified on this theory of national citizenship and on the assumption that the direct attack could be made. It stretches the Constitution just as far as would the direct attack itself. It is dangerous because it is covert, because if we once establish the precedent and grant to Congress the unlimited right to destroy commerce, not as a punishment for crime, or because the thing transported is injurious, but because it enters into competition with other articles, or its method of manufacture, is not approved by the majority in Congress, we place in the hands of the national legislature a power which may prove absolutely subversive of individual liberty and of that freedom of commerce which the Constitution was, above all other things, created to preserve.

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[30] An analogy may be found in the Anti-trust statutes.